United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7513

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7513

CARLO BORDONI,

Plaintiff-Appellant

v.

THE WASHINGTON POST COMPANY,
JACK EGAN and B.C. BRADLEE,

Defendants-Appellees

ON APPEAL FROM A JUDGEMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT OF THE CASE

This is an action for libel. Plaintiff-appellant is an international figure in the worlds of banking, foreign exchange, and international finance generally. Defendants-appellees are The Washington Post Company, publisher of The Washington Post (hereinafter, "the Post"), its Executive Editor, Benjamin Bradlee, and a

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reporter for the Post, Jack Egan.

The Complaint alleged eight causes of action. Claims one to four relate to an article published in the Post on June 22, 1974. Claims five to eight relate to an article published in the Post on June 26, 1974. In the course of reporting on financial difficulties at Franklin National Bank, both articles made certain statements concerning Mr. Bordoni which he contended were libelous per se. The Complaint did not allege special damages.

On motion, the District Court, Edward Weinfeld, J., granted defendants-appellees judgment on the pleadings pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure. The District Court held that neither article is libelous per se: neither disparages Mr. Bordoni in his calling, and neither accuses him of a crime, as he had alleged.

ARGUMENT

I. INTRODUCTION

The Complaint does not allege special damages as to any of the eight claims pleaded. Absent an allegation of special damages, an action for libel must be dismissed unless the statements sued on are libelous per se. E.g., Reporters Ass'n of America v. Sun Printing & Pub. Ass'n, 186 N.Y. 437, 79 N.E. 710 (1906). Whether a statement

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is capable of bearing a meaning that is libelous per se is for the court to determine. Tracy v. Newsday, Inc., 5 N.Y. 2d 134, 136, 182 N.Y.S. 2d 1,3 (1959); Nichols v. Item Publishers, Inc., 309 N.Y. 596, 132 N.E. 2d 860 (1956).

The test of whether a statement is libelous per se was stated by Judge Weinfeld in the companion case of Bordoni v. New York Times Co. No. 74 Civ. 3168 (S.D.N.Y. July 15, 1975), from which no appeal has been taken:

> "As a general rule, a writing or printed article is libelous per se -- that is, without allegation or proof of special damages -- '"if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him' . . . [or] tends to disparage a person in the way of his office, profession or trade.' So, too, a writing that charges the commission of a crime is libelous per se." (J.A.95).1/

In support of this proposition, Judge Weinfeld cited Nichols v. Item Publishers, Inc., 309 N.Y. 596, 600-01 (1956), quoting Mencher v. Chesley, 297 N.Y. 94, 100 (1947); accord, Tracy v. Newsda Inc., 5 N.Y.2d 134, 135-36, 182 N.Y.S.2d 1, 3 (1959); and Jordan v. Lewis, 20 App. Div. 2d 773, 247 N.Y.S.2d 650 (1st Dept. 1964).

1/ "J.A." refers to the Joint Appendix in the instant appeal. The opinion in Bordoni v. New York Times Co., has been included in the Joint Appendix.

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We submit that nothing in either of the articles sued on is libelous per se under this test.

Part II, infra, discusses the article of June 22, 1974 and claims one through four, relating to it. Part III, infra, discusses the article of June 26, 1974 and claims five through eight, relating to it. As to each article, three of the four claims are based solely on the language of the article and the fourth relies on an alleged innuendo. In discussing each article, we address ourselves first to its actual language (the article on its face) and, at the end, to the alleged innuendo.

Part IV, infra, discusses the cases cited by plaintiff-appellant on the question whether the two articles are libelous per se.

Part V, infra, discusses the New York "single instance" rule, and its applicability to the two articles complained of.

II. THE ARTICLE OF JUNE 22 (THE SUBJECT OF CLAIMS ONE THROUGH FOUR) IS NOT LIBELOUS PER SE.

A. Claims One, Two and Four: The Article on Its Face.

The article of June 22, 1974 is headlined: "Merger Plan for Franklin Far Advanced". It contains 17 paragraphs. There is no reference to Mr. Bordoni, by name or otherwise, until the seventh paragraph; and he is referred to only in the seventh, eighth, ninth and tenth paragraphs. Those paragraphs are as follows:

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> "It was also learned yesterday that Carlo Bordoni, a director of Franklin New York Corp., holding company for the bank, resigned at the board's request on Thursday although this has not been publicly announced.
>
> "Bordoni, a Sindona intimate and involved in multiple business enterprises in Sindona's far-flung financial web, was formerly a foreign exchange trader with an international reputation for the scale of his speculation.
>
> "Bordoni has been credited with organizing Franklin's foreign exchange department when Sindona purchased 22 percent of the bank's stock in 1972 and introducing his own style of high-volume foreign exchange speculation.
>
> " Bordoni's exit follows the firing of a foreign exchange trader who the bank charged with falsifying records and hiding transactions. In addition the head foreign exchange trader for Franklin and the executive vice chairman in charge of this area resigned."

Previously, the article had stated: "Franklin National, 20th largest [bank] in the country, reported it lost $63 million in the first five months of the year, with $45.8 million attributed to foreign exchange speculation, most of it unauthorized, according to the bank."

1. The Seventh Paragraph.

The statement that Mr. Bordoni resigned from the board of directors at the board's request is not libelous per se. Nichols v. Item Publishers, Inc., 309 N.Y. 596, 132 N.E. 2d 860 (1956). In Nichols, the defendant had published that the plaintiff had been removed as pastor of a church and that a subsequent meeting that recalled him was illegal. In affirming the dismissal of the

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complaint for failure to state a claim, the Court of Appeals held:

> "The mere fact of one's removal from office carries no imputation of dishonesty or lack of professional capacity. Cf. Thompson v. Hamilton, 229 N.Y. 591 [128 N.E. 234 (1920)]; Rossiter v. New York Press Co., 141 App. Div. 339, 344 [126 N.Y.S. 325 (1910)]. It is only where the publication contains an insinuation that the dismissal was for some misconduct that it becomes defamatory. (See Rossiter v. New York Press Co., supra, 141 App. Div. 399, 344; Ramsdell v. Pennsylvania R.R. Co., 79 N.J.L. 379.)" 132 N.E. 2d, at 862.

Similarly, in Loudin v. Mohawk Airlines, Inc., 27 A.D. 2d 517, 275 N.Y.S. 2d 359 (1st Dept. 1966), the complaint was dismissed where the plaintiff sued on statements that he was being discharged for certifiying as qualified a pilot who should not have been certified. The court observed:

> "There is nothing in the written matter which in any way characterizes plaintiff's act and it is not inferable that he certified the pilot because of improper influences, or that he was generally incapable. Consequently the article is not libelous per se." 275 N.Y.S. 2d, at 360.

See also Ertheiler v. Bernheim, 37 A.D. 472, 56 N.Y.S. 26 (1st Dept. 1899). There, the defendant had written a letter stating, ". . . in the interest of our business, we find it necessary to take a decided stand with respect to our future business relationship with [the plaintiff], and to that end we feel called upon and from this date on will refuse any dealings with them, and under no circumstances will we submit samples of our stock to them." In affirming the dismissal of the complaint, the court observed: "There is

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certainly nothing to justify the inference that this severing of relations between the defendants and the plaintiff was due to any dishonorable conduct on the part of the plaintiff." 56 N.Y.S., at 27.

At p. 17 of the Brief of Plaintiff-Appellant, it is argued that the seventh paragraph bears the innuendo that "Bordoni's resignation was forced by the Board 'in order to restore confidence in the Bank'". That innuendo is not alleged in the Complaint, and therefore cannot be considered.[2/] Moreover, the paragraph does not bear that innuendo. It does not say that Mr. Bordoni's resignation was "forced" by anyone. It says he resigned at the request of the Board. No reason was given why the Board had requested his resignation or why he acceeded to the Board's request. Certainly, it was not stated or implied that the resignation was necessary or requested or forced "in order to restore confidence in the bank." That phrase appears two paragraphs before Mr. Bordoni's name is even mentioned, and it refers to matters wholly unrelated to the part of the article in which he appears:

> "Efforts to merge financially troubled Franklin National Bank with either another New York Bank or with o [sic] major English financial institution are far advanced . . .

2/ See Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 101 (1933); Morrison v. Smith, 177 N.Y. 366, 369 (1904); Cole Fischer Rogow, Inc. v. Carl Ally, Inc., 29 A.D.2d 423, 288 N.Y.S. 2d 556, 562 (1st Dept. 1968); Reoux v. Glens Falls Post Co., 11A.D. 2d 919, 203 N.Y.S.2d 497, 498 (3d Dept. 1960); Lasky v. Kempton, 285 A.D. 1121, 140 N.Y.S.2d 526 (1st Dep't 1955); Yonkers R.R. v. Herald Statesman, Inc., 248 A.D. 633, 288 N.Y.S.286 (2nd Dep't 1936), aff'd, 273 N.Y. 541 (1937); Kuster v. Press Pub. Co., 80 A.D. 615, 80 N.Y.S. 1050, 1051 (1st Dep't 1903).

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" . . .

"The contemplated transaction would probably take the form of a straight acquisition, and it might involve several banks purchasing parts of $5 billion asset Franklin National, the source said.

"In order to restore confidence in the bank, any arrangement would entirely remove mysterious Italian financier Michele Sindona -- now Franklin's [sic] major stockholder -- from the scene, according to the source."

Two paragraphs later, Mr. Bordoni is introduced. Mr. Bordoni is described as an intimate of Mr. Sindona, and Mr. Sindona's removal is said to be connected with restoration of confidence in the bank. However, the article does not connect the prospective removal of Mr. Sindona in the event of a merger with the request by the Board that Mr. Bordoni resign in advance of a merger. Even if such a connection were somehow implied, it is not defamatory of Mr. Bordoni. The only reason suggested in the article as to why Mr. Sindona was going to be removed is that he is "mysterious". It is not defamatory of Mr. Bordoni to say that he is an intimate of an international financier who is "mysterious". Indeed, if the implication is that Mr. Bordoni's resignation was requested because he is an intimate of Mr. Sindona, then any possible defamatory implication as to Mr. Bordoni is removed.

Mr. Bordoni further alleges at p.18 of his Brief the innuendo that "Bordoni's exit 'at the Board's request' is also because the Board charged [him] with falsifying records and hiding transactions . . ." This innuendo also is not alleged in the Complaint and therefore cannot be considered. Moreover, it is

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utterly far-fetched. There is simply nothing in the article to support it. The article does state:

> "Bordoni's exit follows the firing of a foreign exchange trader who the bank charged with falsifying records and hiding transactions. In addition, the head foreign exchange trader for Franklin and the executive vice-chairman in charge of the area resigned."

The clear implication of this passage is that when Franklin thinks a man has falsified records and hidden transactions, it says so. The article does not convey in any way that Franklin had made any charges whatsoever against Mr. Bordoni. The quoted passage simply recounts several recent departures from the bank.

In sum, as Judge Weinfeld found: "The opening statement, that [Mr. Bordoni] resigned as a director at the Board's request, by itself carries no imputation of lack of integrity, nor does it cast aspersions upon his professional competence. The article does not suggest that the request was based upon any misconduct, incompetence or shortcoming." (J.A. 81-82) (citations omitted).

2. The Eighth Paragraph.

The eighth paragraph also is not libelous per se. It does not expose Mr. Bordoni to hatred, etc., or disparage him in his profession to say that he is associated with Michele Sindona or that he is reputed to have engaged as a professional trader in foreign exchange speculation (i.e., foreign exchange trading) on a large scale. Such foreign exchange speculation by a professional trader is a lawful, proper, respectable and dignified business

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activity. In Labouisse v. Evening Post Pub. Co., 10 A. . 30, 41 N.Y.S. 688 (1st Dept. 1896), the defendant printed that the plaintiff had engaged in massive speculation on the cotton exchange with a view to cornering the market and dictating prices. The court held that the statement was not libelous per se: "Now, it would seem to be quite clear that there is nothing defamatory in this publication, or that would in any way injuriously affect the plaintiff in his business, as affecting his credit or his capacity. There is nothing discreditable, unlawful, or disparaging to a man to say of him that he deals or speculates in cotton, since such transactions have been made lawful, and there can be no imputation upon the plaintiff in any way because of the magnitude of his transactions." 41 N.Y.S., at 690.

As Judge Weinfeld pointed out: this paragraph "does not reflect upon [Mr. Bordoni's] professional competency or integrity. Close relationship with another who is engaged in multiple business enterprises or in a 'far-flung financial web' does not cast aspersion upon one in his business life. So, too, that one has an international reputation for the scale of his speculation in foreign exchange does not denigrate his business statute. Speculation is a legitimate activity engaged in by many, whether in stocks, bonds, futures, commodities or foreign exchange. Absent a charge of illegal or reprehensible conduct or incompetence, such activity does not reflect upon one's professional standing. No such charge is made." (J.A. 82-83) (citations omitted).

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3. The Ninth Paragraph.

Similarly, the ninth paragraph is not defamatory of Mr. Bordoni. To say of him that he organized Franklin's foreign exchange department and introduced his own style of high-volume foreign exchange speculation in no way suggests that he is dishonest, incompetent, etc.

Even when it is added that in the first five months of 1974 the foreign exchange department suffered large losses, the statements concerning Mr. Bordoni's association with the department are not defamatory of him. The statements are that Mr. Bordoni organized the department and gave it a certain style of operation. The article does not state that he personally or his organizing of the department or his style was responsible for the losses. As far as appears from the article, Mr. Bordoni's involvement in the foreign exchange department did not extend beyond 1972. There is absolutely no suggestion that he had any role whatsoever in the specific transactions that resulted in losses. Indeed, the article itself states that most of the foreign exchange speculation that resulted in losses was unauthorized, according to Franklin (third paragraph of the article).

That statement is followed by three paragraphs before Mr. Bordoni's name is even mentioned; and there is not the remotest suggestion that he was in any way involved in or responsible

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for any unauthorized transaction.[2/]

Even if a statement merely associating Mr. Bordoni with a foreign exchange department that lost money reflects negatively on him, it still does not amount to libel per se. "The fact that a business enterprise of any character has not been successful does not directly tend to injure the party conducting the enterprise." Perley v. Morning Telegraph Co., 131 A.D. 599, 116 N.Y.S. 57, 59 (1st Dept.), app. dismissed, 196 N.Y. 515, 98 N.E. 1110 (1909).

The Brief of Plaintiff-Appellant argues at p.17 that this paragraph bears the innuendo that "Bordoni's 'own style of high volume foreign exchange speculation has resulted in a $45 million loss' . . . ." That innuendo is not alleged in the Complaint and

2/ Cf. O'Connell v. Press Pub. Co., 214 N.Y. 352, 108 N.E. 556, 557-58 (1915): "The article, insofar as it touches or affects the reputation of the plaintiff, states: The plaintiff testified before the grand jury which was investigating the acts of the officers and employes relating to falsely weighing imported sugar, that he was the inventor of the corset steel spring, that he showed the spring to an official of the company who referred him to an employe having charge of the weighing, and that the spring was used in falsifying the scales . . . The publication does not charge the plaintiff with a crime or expose him to contempt, ridicule or disgrace. The invention of a device which may be used for criminal purposes and the showing of it to a person in whose business it might be so used, and the fact that he did use it, do not, within reasonable and fair contemplation or understanding, tend to incriminate or disgrace the inventor. The plaintiff was not charged by the publication with an illegal or immoral act or exposed to contempt, ridicule or disgrace." Complaint dismissed." See also Hehmeyer v. Harper's Weekly Corp., 170 A.D. 459, 156 N.Y.S. 98 (1915) (where plaintiff was sole American distributor of a drug, statement that drug is a fraud is not libelous per se of the plaintiff, though it may be of manufacturer); Armstrong v. Sun Printing & Pub. Ass'n., 137 A.D. 828, 122 N.Y.S. 531 (2d Dept. 1910).

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therefore cannot be considered. Moreover, the innuendo is not defamatory of Mr. Bordoni. The news article as a whole makes clear that Franklin's foreign exchange losses resulted from numerous factors over which Mr. Bordoni obviously had no control: namely, all the factors going into the actual operation of the foreign exchange department after his organizational work had ended. It is only in a remote and attenuated sense that the article in any way suggests that Mr. Bordoni's organizational efforts "resulted in" the losses that occurred two years later. By comparison, if Stan Musial teaches his batting stance to a baseball player, and two years later that player, using that batting stance, bats poorly, it could perhaps be said that Musial's batting stance "resulted in" the poor batting. But that statement would not imply: (i) that Musial is an incompetent batter, (ii) that Musial is generally an incompetent batting teacher, (iii) that Musial was responsible for the poor batting, or (iv) that anyone other than the player himself was responsbile for his poor batting. As Judge Weinfeld concluded, "Responsibility for introducing a policy of foreign-exchange speculation by itself does not disparage one in his calling. The article nowhere suggests that the introduction of the foreign exchange program was achieved or accompanied by improper conduct or dishonesty." (J.A. 83).

The Brief of Plaintiff-Appellant further argues at p.17 that this paragraph bears the innuendo that "Bordoni's 'own style of high volume foreign exchange speculation' was generaly 'unauthorized'

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. . . ." That contention is preposterous. The reference to unauthorized transactions appears in the third paragraph of the article. Mr. Bordoni is first mentioned in the seventh. Absolutely no connection is made between the two. What the article conveys is that Mr. Bordoni organized the foreign exchange department as a high volume operation after Mr. Sindona had purchased a controlling interest in 1972; and that in the first quarter of 1974 unauthorized transactions within the department resulted in heavy losses. There is not the remotest suggestion that Mr. Bordoni's activity circa 1972 was in any way associated with unauthorized transactions in 1974. Indeed, the reference to unauthorized transactions is helpful to Mr. Bordoni's reputation since it suggests that his style did not result in the losses, which were due, rather, to unauthorized transactions.

In sum, as Judge Weinfeld found: "The article neither states nor implies that plaintiff's activities as a Bank director, or his organization of the foreign-exchange department, were the cause of the Bank's losses. Introduction of a style of action is one matter; its implementation is another. The article nowhere suggests that once the foreign-exchange department was organized, Mr. Bordoni participated in any of the transactions which resulted in the losses. Indeed, the statement that most of the foreign-exchange speculation was unauthorized points in another direction, particularly when considered with the reference to the discharge of the foreign-exchange trader whom the Bank charged with falsifying records and

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hiding transactions. Thus the court concludes that a fair reading of the article in context, giving full import to those portions which mention the plaintiff, does not justify the three claims that the article is libelous per se. Moreover, the defect in those claims would not be cured by an allegation of innuendo that plaintiff was responsible for the foreign-exchange losses." (J.A. 84-85).

4. The Tenth Paragraph.

The tenth paragraph, which refers to Mr. Bordoni, also is not defamatory of him. It merely places his exit from the board of directors in time sequence with the departure of other officials from the Bank.

B. Claim Three: The Alleged Innuendo

The foregoing analysis shows that the language of the June 22, 1974 article on its face is not libelous per se under the applicable New York authorities. Mr. Bordoni's first, second and fourth claims rely solely on the language of the article, without any innunedo; and therefore, under the foregoing analysis, they fail to state a claim upon which relief can be granted.

Mr. Bordoni's third claim sets forth an alleged innuendo:

> "32. It is well-known in the financial community that FRANKLIN is a publicly owned company whose stock was traded on the New York Stock Exchange and is required to file periodic reports with the said Exchange and various Federal regulatory agencies.
>
> "32. By the said article, the Defendants meant, and intended to mean and were understood to mean, by persons reading the said article, that BORDONI had participated in criminal acts in violation of certain Federal banking statutes and other Federal statutes, rules and regulations, including but not limited to disclosure requirements to which public

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and banking corporations such as FRANKLIN and the BANK are subject." (J.A.9, 10).

The innuendo is plainly insufficient to render the June 22, 1974, article libelous per se.

New York law concerning an innuendo was summarized in Tracy v. Newsday, Inc., 5 N.Y. 2d 134, 136, 182 N.Y.S. 2d 1, 3-4 (1959):

> "It is for the court, however, to decide whether a publication is capable of the meaning ascribed to it. Crane v. New York World Tel. Corp., 308 N.Y. 470, 479-480, 126 N.E. 2d 753, 759, 52 A.L.R. 2d 1169; Julian v. American Business Consultants, 2 N.Y. 2d 1, 14, 155 N.Y.S. 2d 1, 13. The canons are well known that where the words are clear and plain, the court must determine whether they are libelous or nonlibelous; and whether the innuendo is necessary. O'Connell v. Press Pub. Co., 214 N.Y. 352, 108 N.E. 556; Morrison v. Smith, 177 N.Y. 366, 69 N.E. 725; Seelman, Law of Libel and Slander in New York, par. 436, p. 426. The admitted purpose of an innuendo is to explain matter that is insufficiently expressed. Its office is to point out the libelous meaning of the words used. If the article is not susceptible of a libelous meaning, then innuendo cannot make it libelous. In Fry v. Bennett, 5 Sandf. 54, 65, the court stated the rule in this manner: "In brief, the question which an innuendo raises, is, in all cases, a question not of fact, but of logic. It is, simply, whether the explanation given is a legitimate conclusion from the premise stated; and to determine this question, must be, in all cases, the exclusive province of the court." See, also, Seelman, op. cit., supra, paras. 421,430; Hays v. American Defense Soc., 252 N.Y. 266, 169 N.E. 380; O'Connell v. Press Pub. Co., supra. The innuendo, therefore, may not enlarge upon the meaning of words so as to convey a meaning that is not expressed (Gurtler v. Union Parts Mfg. Co., 285 App. Div. 643, 644-645, 140 N.Y.S. 2d 254, 255-256, affirmed 1 N.Y. 2d 5, 150 N.Y.S. 2d 4)."

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Nothing in the June 22, 1974 article refers to any failure by anyone to make disclosures required under banking, securities, or other laws, rules or regulations. There is no suggestion of any failure by Franklin to make any such disclosures. And there is no suggestion that Mr. Bordoni himself failed to make any required disclosures or that he even was personally subject to any disclosure requirement or responsible for Franklin's compliance with disclosure laws. Finally, nothing in the article would lead any reasonable reader to surmise that Mr. Bordoni has engaged in any criminal acts. As was the case in Tracy v. Newsday, Inc., supra, "'[t]he pleaded innuendo is strained, unreasonable and unjustified.' It does not explain any statement in the article, but adds an entirely new and independent thought that finds no support in the article." 5 N.Y. 2d, at 137, 182 N.Y.S. 2d, at 4. As Judge Weinfeld concluded, "To infer that the [article] charged plaintiff with participating in criminal acts is to enlarge impermissibly upon the plain meaning of the language used." (J.A.91).

III. THE ARTICLE OF JUNE 26 (THE SUBJECT OF CLAIMS FIVE THROUGH EIGHT) IS NOT LIBELOUS PER SE.

A. Claims Five, Six and Eight: The Article on its Face

The article of June 26, 1974 is headlined: "Deals Aimed at Profits for Franklin". It consists of sixteen paragraphs. Mr. Bordoni is not referred to by name or otherwsie until the twelfth

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paragraph; and he is referred to only in the twelfth, thirteenth, fourteenth and fifteenth paragraphs. Those paragraphs are as follows:

> "The source confirmed that the Comptroller [of the Currency] was looking into the involvement of Carlo Bordoni in Franklin's foreign exchange operations but said this was not related to mis-evaluations of transactions related to recent losses.
>
> "Bordoni, a former foreign exchange trader who is involved in many of Sindona's enterprises, including the Milanese banks, was put on the board of Franklin New York Corp., holding company for the bank, in 1972. He resigned from the board last Thursday with no reason given.
>
> " Bordoni today denied he resigned at the request of the Franklin board and said he was not involved in the foreign exchange transactions which led to the Franklin losses, Dow Jones News Service reported.
>
> "Bordoni is credited with organizing Franklin's foreign exchange operations in 1972 and introducing the high-volume speculative style he has been noted for and which some observers feel got the bank into trouble."

In addition, the following and final paragraph states:

> "An investigation by the Comptroller into whether possible fraud was involved in the recent foreign exchange losses is continuing, according to a source, and includes everyone 'from the newest employee to the top of the bank.' The investigation into the whole foreign currency matter by the Comptroller is expected to wind up next week."

These statements are no more defamatory of Mr. Bordoni than are the statements in the June 22, 1974 article, discussed supra.

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1. The Twelfth Paragraph

The first quoted paragraph concerning Mr. Bordoni, the twelfth paragraph of the article, reports that a federal banking authority is looking into his involvement in Franklin's foreign exchange operations. The statement that a person is being investigated by criminal law enforcement authorities is not libelous per se. 1 E. Seelman, The Law of Libel and Slander in the State of New York, 110 & nn. 228, 229 (1964) (police investigation of plaintiff near murder scene and report of investigation; person subpoenaed or summoned for examination in investigation). Here, the reported inquiry was not by a criminal law enforcement authority, but by a civil regulatory authority; therefore, this is an a fortiori case. See Smith v. Staten Island Advance Co., 276 A.D. 978, 95 N.Y.S. 2d 188 (2d Dept. 1950). The quoted language does not suggest that the Comptroller had discovered any wrongdoing by Mr. Bordoni, whether civil or criminal; it does not suggest that the Comptroller had made any accusations against him or suspected him of any violation of law or propriety; and it does not suggest that the Comptroller had determined even that Mr. Bordoni was deeply involved in Franklin's foreign exchange transactions. The very words used -- "the Comptroller was looking into" -- suggest more a routine inquiry than a serious investigation of a target.

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Moreover, any remotely possible implication of wrongdoing by Mr. Bordoni is negatived by the statement in the paragraph that the Comptroller's inquiry "was not related to misevaluations of transactions related to recent losses." In addition, the final paragraph of the article, quoted supra, states that everyone at the Bank was being investigated, so that no particular negative significance could reasonably be read into the statement that Mr. Bordoni's involvement was being looked into.

The Brief for Plaintiff-Appellant argues at p.20 that the article bears the innuendo that "Bordoni's actions relating to foreign currency transactions and speculations might be fraudulent and illegal, thereby involving Bordoni in the commission of a crime." No such allegation is made in the Complaint, and therefore the innuendo cannot be considered. Moreover, the article does not bear that innuendo; and, in any event, it is not defamatory. Nothing in the article suggests any concrete possibility that any action by Mr. Bordoni was unlawful. The article does report that the Comptroller is investigating possible fraud, and that the investigation includes every employee of the Bank. The Court can take judicial notice that Franklin had many employees. A statement that the Comptroller is investigating a large group of people simply because they work for Franklin does not focus any attention on Mr. Bordoni, does not even raise a serious question as to whether he has committed a crime, and therefore does not defame him. Indeed, even the reference to the investigation does not suggest

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that the fraud under inquiry is criminal rather than civil.

As Judge Weinfeld concluded: " . . . the references to the Comptroller General's 'looking into' Bordoni's involvement in Franklin's foreign-exchange operations, and to a continuing investigation by the Comptroller into possible fraud in connection with the recent foreign-exchange losses, which investigation included everyone 'from the newest employee to the top of the Bank,' do not cast aspersions upon the plaintiff in his business calling. The Comptroller was engaged in the performance of his duties, and a statement as to the scope of his inquiry and those who may come within its embrace, without more, does not impugn plaintiff's business competency or integrity. [Citation to Seelman, The Law of Libel and Slander 110 nn. 228, 229 (1964).] Moreover, the article contains no statement that Bordoni is charged with a crime or that charges against him are under consideration. To hold libelous per se a statement that an authorized agency was 'looking into' Bordoni's involvement in Franklin's foreign-exchange operations, the proper subject of official inquiry, would result in sterile news reporting." (J.A. 89-90).

2. The Thirteenth Paragraph.

The second quoted paragraph concerning Mr. Bordoni, the thirteenth paragraph of the article, merely restates matters previously reported in the article of June 22, 1974. It is in no way defamatory of Mr. Bordoni.

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3. The Fourteenth Paragraph.

The fourteenth paragraph of the article reports Mr. Bordoni's denial that he resigned at the request of the board of directors, and his statement that he was not involved in any foreign exchange transactions that led to losses to Franklin. Nothing in this paragraph reflects adversely on Mr. Bordoni.

4. The Fifteenth Paragraph.

The fifteenth paragraph of the article largely restates matter previously set forth in the article of June 22, 1974, and considered at pp. 9-15, supra. The one addition is the statement that some observers feel that Mr. Bordoni's high-volume speculative style got the Bank into trouble. The implication is that Mr. Bordoni's style led ultimately to Franklin's foreign-exchange losses. Even this implication, however, is not libelous per se.

The most that could reasonably be read into the statement is that in a particular setting, in a particular state of the foreign-exchange market, and as carried out by the particular staff at Franklin, Mr. Bordoni's speculative style led to losses. There is no implication that Mr. Bordoni personally was directly responsible for the losses, or that his style and expertise do not generally lead to success. The style merely led to losses in a particular venture at a particular time and place. Foreign exchange experts, like lawyers, doctors and other mortals, are human and so sometimes make mistakes of judgment or fail in particular cases or ventures.

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The New York courts have recognized that a statement that a professional man has erred in a particular matter does not reflect on his general professional competence or integrity. See the discussion of the "single instance rule" at pp.33-40, infra. As Judge Weinfeld noted: "[T]he article does not state or imply that following the establishment of the policy [of high volume speculation], Bordoni played any role in any of the foreign-exchange transactions which resulted in the losses. There is, of course, no assurance of success in any market purchase, and the fact that losses are sustained in the execution of a program does not stamp the initiator as incompetent in his calling." (J.A.89).

5. Paragraphs That Do Not Refer to Bordoni.

The Brief for Plaintiff-Appellant argues for three innuendos relating to paragraphs of the June 26 article that do not refer to Mr. Bordoni. None of the three was pleaded in the Complaint, and so none can properly be considered by the Court. Moreover, Mr. Bordoni's arguments for the three innuendos have no merit.

Mr. Bordoni argues at p.19 of his Brief that the article bears the innuendo

> "That Bordoni was involved in foreign currency transactions 'shunted Franklin's way' to create a favorable but false financial statement for the Franklin National Bank . . . ." (emphasis supplied).

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The article does not bear this innuendo. Nothing in the article connects Mr. Bordoni to any transactions "shunted Franklin's way" to improve its financial statements. Such transactions are discussed at length in the early part of the article, and the discussion does not refer to Mr. Bordoni in any way. Prior to the introduction of Mr. Bordoni's name, the article makes clear that "[t]he profitable foreign exchange business directed to Franklin and the losses in the same area seem to be independent events" (third paragraph). Later, the article reports: "the Comptroller was looking into the involvement of Carlo Bordoni in Franklin's foreign exchange operations." In the context of the article, that sentence could be read only to mean that the Comptroller was looking into Mr. Bordoni's involvement generally. The sentence does not bear the innuendo that the Comptroller was focusing on Mr. Bordoni's possible involvement in the transactions "shunted Franklin's way," much less the innuendo that Mr. Bordoni actually was involved in such transactions.

Moreover, the innuendo is not defamatory. Even if the article did suggest that Mr. Bordoni was "involved" in such transactions, nothing in the article suggests that the involvement was anything other than wholly innocent. Unless the article stated that Mr. Bordoni's involvement was unlawful or improper, it is not defamatory of him. E.g., O'Connell v. Press Pub. Co., 214 N.Y.

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352, 108 N.E. 556, 557-58 (1915); Hehmeyer v. Harper's Weekly Corp., 170 A.D. 459, 156 N.Y.S. 98 (1st Dept. 1915); Armstrong v. Sun Printing & Pub. Ass'n, 137 A.D. 828, 122 N.Y.S. 531 (2d Dept. 1910). Indeed, in the instant case the article does not suggest that there was any unlawful or improper conduct on the part of anyone: "[The source] added that there might be nothing illegal in any of this as far as Franklin was concerned . . . ." (fifth paragraph).

Mr. Bordoni's Brief at pp. 19-20 argues that the article bears the innuendo that "Bordoni was connected with the banks with which Franklin conducted the foreign-exchange trading criticized in this article . . . ." First, the article does not criticize any foreign exchange trading. It reports certain facts about Franklin's trading and the activities of regulatory officials with respect to that trading. Second, the article does not connect Mr. Bordoni with any bank with which Franklin engaged in a foreign exchange transaction. Even if such an inference could be drawn, it is not defamatory of Mr. Bordoni. A statement that Bordoni was "connected" with a bank from which Franklin earned a profit does not mean or imply that Bordoni was involved (much less unlawfully or improperly involved) in a transaction in which Franklin earned the profit. Bordoni may have been "connected" with one or more of the foreign banks, and may have had absolutely no knowledge of the particular transactions under inquiry.

Mr. Bordoni's Brief at p.20 argues that the article bears the innuendo "that Bordoni was 'shooting craps' in foreign currency

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exchange losses sustained by the bank . . . ." The article does not bear that innuendo. First, it does not state, suggest or imply that Mr. Bordoni participated in any foreign exchange transactions whether profitable or unprofitable. It, therefore, does not state, suggest or imply that he was "shooting craps" in connection with Franklin's foreign exchange operations. It does quote a bank regulatory official as saying that foreign currency speculation was like shooting craps. It is plain that the characterization, as made and as reported, applies to foreign exchange speculation generally, and not to Mr. Bordoni or any other foreign exchange personage in particular. Finally, the article does not state, suggest or imply that Mr. Bordoni had any involvement in Franklin's foreign exchange speculation, other than organizing the department and imparting to it his personal high volume style some time ago. The article does not suggest that, apart from considerations of volume, Mr. Bordoni took greater risks than other foreign exchange speculators or that any decisions of his led to losses.

B. Claim Seven: The Alleged Innuendo.

Mr. Bordoni's seventh claim, relating to the June 26 article, alleges the identical innuendo contended for in his third claim, relating to the June 22 article. Compare Complaint ¶¶32, 33 (J.A. 9-10) with id, ¶¶ 52, 53 (J.A.14). The deficiency of the innunedo pleaded in the third claim was demonstrated at pp. 15-17 supra. The innuendo alleged in the seventh claim is no better.

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Nothing in the paragraphs of the June 26 article that relate to Mr. Bordoni suggests that he has violated any banking, securities or other laws, rules or regulations. Nothing in those paragraphs suggests that he has failed to make any required disclosure, or even that he was personally subject to any disclosure requirement or responsible for Frnaklin's compliance with disclosure laws.

More broadly, nothing in the June 26 article as a whole suggests that Mr. Bordoni has violated any law, rule, or regulation, or failed to make any required disclosure. The early paragraphs of the article, in which Mr. Bordoni is not referred to directly or even obliquely, discuss certain transactions that earned an automatic profit for Franklin. The article expressly states that the reporter's source "added that there might be nothing illegal in any of this as far as Franklin was concerned . . ." (paragraph 5 of the article).

As was true of Mr. Bordoni's third claim, "'the pleaded innuendo is strained, unreasonable and unjustified.' It does not explain any statement in the article, but adds an entirely new and independent thought that finds no support in the article." Tracy v. Newsday, Inc., 5 N.Y.2d 134, 137, 182 N.Y.S.2d 1, 4 (1959).

As Judge Weinfeld concluded with respect to both claims: "There is nothing in either article which justifies the asserted innuendo or that is capable of the meaning plaintiff ascribes to it.

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As indicated above, there is no charge that plaintiff or any other person violated the federal banking laws, failed to make disclosures required by law, engaged in criminal conduct, or even was suspected of having engaged in criminal conduct. There is no suggestion, much less any statement, that Bordoni had any responsibility for Franklin's compliance with the disclosure laws. To infer that the articles charged plaintiff with participating in criminal acts is to enlarge impermissibly upon the plain meaning of the language used." (J.A.91).

IV. THE AUTHORITIES CITED BY PLAINTIFF-APPELLANT DO NOT APPLY TO THE INSTANT CASE.

The cases previously cited in the text of this Brief were all cited in the District Court. Neither there nor here has plaintiff-appellant made any attempt to distinguish any of them. Instead, he has merely cited different cases in an attempt to show that the articles complained of are libelous per se. However, each of these cases is distinguishable. They are discussed here in the order in which they appear in the Brief of Plaintiff-Appellant.

Harrison v. Winchell, 207 Misc. 275, 137 N.Y.S. 82 (1955), was a lower court decision. Winchell had written that Life magazine had paid a substantial sum to settle a claim arising out of an article written by Harrison. The court held that the statement possibly bore the innuendo that Life had bought its peace "because of a wrong done by the plaintiff." 137 N.Y.S., at 84. In the

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instant case, neither article reports any definitive action such as the payment of a substantial sum of money, from which a wrong by Mr. Bordoni could reasonably be inferred. The instant articles speak only of inquiries, not of final actions, and they do not link Mr. Bordoni with any specific wrongdoing, as did the statement sued on in Harrison.

Moore v. Francis, 121 N.Y. 199 (1890), involved a publication "that there had been a little trouble in [a bank's] affairs occasioned by the mental derangement of Teller Moore, and that the latter's statements, when he was probably not responsible for what he said, had casued some bad rumors." The court held that the imputation of mental derangement in connection with the discharge of the plaintiff's business duties was libelous per se. The instant articles do not suggest any mental incapacity on the part of Mr. Bordoni.

Daily v. Engineering & Mining Journal, 94 A.D. 314, 88 N.Y.S. 6 (1st Dept. 1904), involved an article that stated: "Attachments have been placed on the property of the Copper King Mining Company . . . . This is the mine in which W.H. Daily figures largely. His extravagance startled people, and finally got the company into trouble." The court pointed out that the article also said, "the whole failure is the result of extravagant management." Those statements made Daily solely and directly responsible for the failure of the company. And his failing was said to be "extravagance," i.e., excessive spending of funds without business justifi-

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cation. By contrast, the articles in the instant case do not make Mr. Bordoni either solely or directly responsible for Franklin's foreign-exchange losses. The articles make clear that the losses resulted from the operation of the foreign-exchange department as a whole, and that a large part of the losses resulted from unauthorized transactions. Moreover, the articles describe Mr. Bordoni's role as the organizing of the foreign-exchange department, not the conduct of its operations. Finally, though it may defame a man to accuse him of business extravagance, it does not defame him to say that he organized and imparted his high-volume style to a department that later suffered losses in the kinds of transactions it was intended to engage in. Losses can result from transactions honestly and competently carried out. By contrast, "extravagance" to the point of financial failure strongly suggests disloyalty to one's business.

The decision in Sullivan v. Daily Mirror, Inc., 232 A.D. 507, 250 N.Y.S. 420 (1st Dept. 1931), was based squarely on an unmistakeable charge of bribery. The defendants' column, after mentioning plaintiff Ed Sullivan's praise of Primo Carnera, indicated the reason for that praise:

> ". . .oh, what I know about Eddie Sullivan!
> . . . Eddie used to be a press agent once.
> Did I say he used to be? . . .That is, he
> can't take a bit of rough joshing . . .
> Otherwise, he can -- and does -- take it . . .
> Now hop back into Primo's left shoe, Eduardo . . ."

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Nothing remotely comparable appears in the instant articles.

In Vigoda v. Marchbein, 13 A.D.2d 111, 213 N.Y.S.2d 778 (1st Dept. 1961), there was a strong implication of embezzlement. The statement was that the plaintiff "asked our Office-Secretary to give him 'a certain amount of blank receipts' from our receipt book, which she did. All he has turned in to our office from the appeal was $250 . . . . As your secretary at that time I had to ask (plaintiff) for an account of all the receipts he had taken. He got very angry at me, saying I do not trust him!" No such crystallized charge of a specific crime is made against Mr. Bordoni in the instant articles.

Brown v. Tregoe, 236 N.Y. 497 (1923), involved an attack on credit-worthiness. The court held:

> "Under proper innuendoes we think that a jury at least would be permitted to say that when defendants, with the surrounding statements, reported that 'the paying qualities' of Brown had been criticized this would mean either that he was in a financial straits and thus unable to pay promptly or else that he intentionally and improperly retained moneys which came into his hands in his collection business." 236 N.Y., at 502.

Nothing in the instant articles could possibly be interpreted as charging that Mr. Bordoni was in financial straits or that he improperly retained funds that came into his hands.

Sawyer v. Bennett, 20 N.Y.S. 835 (Sup. Ct. 1892), involved the following statement: "Sawyer, Wallace & Co., the largest commission merchants in New York, have failed for $2,000,000. The failure was caused by three London agents [plaintiffs'] reckless speculation in lard." The instant articles differ from that

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statement in the following critical respects: (i) the articles do not convey that Mr. Bordoni (or anyone else) speculated "recklessly", i.e., without adequate attention to the circumstances; (ii) the articles do not convey that Mr. Bordoni himself "caused" any financial difficulties; the greatly diluted nature of his responsibility (if any), as reported in the articles, has been shown supra.

In Liccione v. Collier, 133 A.D. 40, 117 N.Y.S. 639 (1st Dept. 1909), a judgment for the plaintiff was reversed due to an error in instructions. The appellate court did not rule on whether the statement sued on was libelous per se. The statement appeared under an illustration of the plaintiff's bank:

> "A typical bank, money exchange and notary's office. In institutions of this kind are kept the earnings of ignorant immigrant workers. Inaccurate accountings are made to them at stated period, when absurd charges are also made for postage, letter writing, ... "

Nothing comparable appears in the instant articles. There is no suggestion that Mr. Bordoni made inaccurate accountings or absurd charges.

Jacquelin v. Morning Journal Ass'n., 39 A.D. 515, 57 N.Y.S. 299 (1st Dept. 1899), did not involve any question of libel per se. The statement sued on was an outright charge of fraud. Nothing comparable appears in the instant articles.

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In Rodger v. American Kennel Club, 131 Misc. 312, 226 N.Y.S. 451 (Sup. Ct. 1928), the plaintiff sued on a flat statement that he had been disciplined "for misconduct in connection with the sale [illegible]" a collie. The court held the statement actionable, but rejected the alleged innuendo that the plaintiff had engaged in fraud. In the instant case there is no statement that Mr. Bordoni had been disciplined for, or had even engaged in, misconduct.

Kahane v. Murdoch, 218 A.D. 591, 218 N.Y.S. 641 (1st Dept. 1926), involved a straightforward charge of forgery: a statement that the plaintiff "went so far as to alter or forge orders." There is nothing comparable in the instant articles.

In sum, the cases cited by Mr. Bordoni all involved charges of crime or overreaching or other explicitly delineated wrongdoing, or an attack on credit-worthiness. None of those cases covers the instant facts, even by analogy.

V. UNDER THE NEW YORK "SINGLE INSTANCE" RULE, NEITHER ARTICLE IS LIBELOUS PER SE.

The parties to this appeal agree that the case is governed by New York law. In deciding the case below, the District Court did not reach the question whether the two articles complained of could be defamatory in light of New York's "single instance" rule. However, that rule provides an additional ground for affirming the judgment of the District Court.

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For more than a hundred and sixty years, New York law has recognized that a statement critical, or even defamatory, of a person with respect to a particular business venture or activity is not libelous per se. In the instant case, the articles in question relate to a one-time activity by Mr. Bordoni -- the organization of Franklin's foreign-exchange department. Accordingly, the articles in question are not libelous per se in light of the single instance rule.

The leading New York case is Foot v. Brown, 8 Johns. 64 (1811). Foot was an attorney in an ejectment suit, and Brown said to Foot's client: "Foot knows nothing about the suit and he will lead you on until he has undone you." The jury returned a verdict for Foot, but the court arrested it, explaining:

> "The words, as laid, only go to charge the plaintiff with ignorance or want of skill in the particular ejectment suit mentioned; and such charge is not actionable without laying and proving special damages. If a suit would lie for these words, it would lie for saying that a physician did not understand the nature of the disease of a particular patient. Such a charge does not affect the party generally in his reputation and therefore the law will not give a remedy . . . . The law only gives an action for words that affect a man's credit in his profession, as charging him with ignorance or want of skill in general, or a want of integrity either in general, or in particular . . . . There is not an instance in the books, which we have met with, of a suit sustained for words charging a professional man with ignorance in a particular case. To carry the right of action so far would be unnecessary for the protection of any profession, and would be an unreasonable check upon the freedom of discussion. There is no physician, however eminent, who is not liable to mistake the symptoms of a particular disease; nor any attorney who may not misunderstand the complicated nature and legal consequences of a particular litigation . . . . There being no special damages averred in this case, the judgment ought to be arrested." 8 Johns., at 68-69.

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The rule of Foot v. Brown has been followed in a host of subsequent cases down to the present.

In Arnold Bernhard & Co. v. Finance Pub. Corp., 25 N.Y. 2d 712, 307 N.Y.S. 2d 220, 255 N.E. 2d 560 (1969), the plaintiff was the publisher of an investment advisory service. Defendant published in its financial magazine that the plaintiff had recommended a stock that had then declined in value. In affirming a judgment for the defendant, the Appellate Division stated:

> "The subject article in defendant's magazine is not libelous per se; it imputes nothing evil to plaintiff, nor does it charge either negligence or incompetence, consisting as it does of the sardonic recital of what at worst might be considered a single instance of mistaken exercise of business judgment on plaintiff's part, without any imputation of fraud, deceit or malpractice. Nothing pleaded justifies an inference of malice, nor are special damages alleged. In sum, the complaint does not allege a cause of action in libel by any applicable standard." 298 N.Y.S. 2d, at 740.

The Court of Appeals affirmed. The same analysis applies to the instant case.

In Smith v. Staten Island Advance Co., 276 A.D. 978, 95 N.Y.S. 2d 188 (1950), defendant published an article falsely stating that "after an inquiry by the Maritime Hearing Unit of the Coast Guard, plaintiff, the master of a ship, and another were found to have been at fault and to have violated the rules of the road whereby a collision occurred, and both were fined $50." No special damages were pleaded. The Appellate Division affirmed the dismissal of the complaint for failure to state a claim:

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> "The article does not hold up the plaintiff to the public as an incompetent or unskilled master. A single instance in the conduct of his calling is stated to have been marked by a breach of the rules of the road. The article does not state plaintiff was charged with a crime or that the inquiry by the unit of the Coast Guard resulted in a criminal charge or fine for a crime."

The court noted that the relevant penalty was recoverable in a civil proceeding.

In Hirschhorn v. Group Health Ins., Inc., 9 A.D. 2d 905, 194 N.Y.S. 2d 1002 (2d Dept. 1959), the defendant, in rejecting a claim for medical insurance coverage by a patient of the plaintiff doctor, stated that the treatment given by plaintiff was not in accordance with accepted medical standards. The court held that the statement was not libelous per se.

In Martin v. Wagner, 30 Misc. 2d 1074, 220 N.Y.S. 2d 324 (1961), the defendant, actress Natalie Wood (Wagner), said of the plaintiff, her stand-in or double in a film, that the plaintiff couldn't swim and that she (Wood) had had to do the swimming scene herself. The plaintiff claimed that this statement was false and injurious to her in her professional reputation as a stand-in. The court held that the statement was not libelous per se because it dealt with only one aspect of a stand-in's work. To the same effect is Walker v. Best, 107 A.D. 304, 95 N.Y.S. 151 (2d Dept. 1905) (charge that schoolteacher was careless in blackboard work held not libelous per se).

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See also, e.g., November v. Time, Inc., 13 N.Y. 2d 175, 244 N.Y.S. 2d 309, 311, 194 N.E. 2d 126 (1963); Twiggar v. Ossining Printing & Pub. Co., 161 A.D. 718, 146 N.Y.S. 529 (1914); Amelkin v. Commercial Trading Co., 23 A.D. 2d 830, 259 N.Y.S. 2d 396 (1st Dept. 1965), aff'd., 17 N.Y. 2d 500, 267 N.Y.S. 2d 218, 214, N.E. 2d 379 (1966) (statement that insurance agent while handling claim for loss failed to protect a party's security interest; held: not libel per se); Berman v. Medical Society of New York, 23 A.D. 2d 98, 258 N.Y.S. 2d 497 (1st Dept. 1965); Rager v. Lefkowitz, 20 A.D. 2d 867, 249 N.Y.S. 2d 486, 489-90 (1st Dept. 1964) (statement that plaintiff "is reckless and irresponsible" held not libelous per se in the circumstances); Flores v. Mosler Safe Co., 7 A.D. 2d 226, 182 N.Y.S. 2d 126 (3d Dept.), aff'd. as to other cause of action, 7 N.Y. 2d 276, 196 N.Y.S. 2d 975, 164 N.E. 2d 853 (1959) (statement that plaintiff caused a fire); Cowan v. Time, Inc., 41 Misc. 2d 198, 245 N.Y.S. 2d 723 (1963) (photograph plus caption suggesting unsafe use of boat by plaintiff).

Against the background of these cases, it is clear that the instant statements concerning Mr. Bordoni are not libelous per se. At the very most, they connect him very indirectly with a single phase of a business operation that eventually lost money. Cf. Foot v Brown, supra. The statements relate to only a single instance in Mr. Bordoni's varied professional career as domestic banker, international banker, economist, financial expert, business executive, author, and editor (Complaint ¶¶ 7-11, J.A. 4-5). Cf.

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Martin v. Wagner, supra. Statements associating him with a business that lost money are no more libelous per se than were the statements connecting an investment advisor with erroneous investment advice, cf. Arnold Bernhard & Co. v. Finance Pub. Corp., supra, or the statements that a ship captain's violation of the rules of the road caused a collision, cf. Smith v. Staten Island Advance Co., supra, or the statements that a physician's treatment was not in accordance with accepted medical standards, Hirschhorn v. Group Health Ins., Inc., supra.

Mr. Bordoni contends that New York's single instance rule applies only to cases involving "an isolated transaction" (Brief of Plaintiff-Appellant 36-37), and he contends that it does not apply to a single activity or course of dealing. The cases are to the contrary. For example, Foot v. Brown, itself involved a statement about an entire litigation, which includes pleading, motions, arugment, other pre-trial matters, trial, appeal, etc. In Hirschhorn v. Group Health Ins., Inc., supra, the statement concerned medical services given in June and July, 1957. See 175 N.Y.S. 2d 775, 776. Thus more than one visit to the doctor, more than one performance of medical services, more than one isolated instance, was involved.

The instant case, like Foot and Hirschhorn, involves a single connected episode on Mr. Bordoni's part -- the organizing of Franklin's foreign-exchange department. The articles do not impute to Mr. Bordoni a lack of honesty or a general lack of competance. Moreover, the articles do not attribute to him Franklin's

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"entire series of foreign currency transactions" (Brief of Plaintiff-Appellant 38), which resulted in losses. At most, the articles suggest that his high-volume style, when carried out by others in the particular circumstances of the 1974 foreign exchange market, led to losses.

The cases cited by Mr. Bordoni in opposing the application of the single instance rule to the instant case are all readily distinguishable. In Foot v. Brown, itself, it was recognized that the rule does not apply to statements attacking a person's integrity, as distinct from the quality of his performance in a single instance. See p.34, supra. Three of the cases cited by Mr. Bordoni involved attacks on integrity. In November v. Time, Inc., 13 N.Y. 2d 175, 244 N.Y.S.2d 309, 194 N.E.2d 126 (1963), the statements in issue bore the meaning "that plaintiff for his own selfish purposes gave his client deliberately misleading legal advice, to the client's embarrassment and damage." 244 N.Y.S.2d at 310. Similarly, in Kleeberg v. Sipser, 265 N.Y. 87 (1934), the statements charged that the plaintiff attorney had fomented litigation, lacked good faith, created unnecessary expenses, and disregarded his client's wishes.[3/] And in Mason v. Sullivan, 26 A.D.2d 115,

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3/ In fact, the single instance rule was neither cited to nor considered by the court.

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271 N.Y.S.2d 314 (1st Dept. 1966), the court found that an accusation that the plaintiff, a comedian, had made an obscene gesture during a television appearance charged him with "a lack of character or a total disregard of professional ethics." 271 N.Y.S.2d at 316. In the fourth case cited by Mr. Bordoni, Twiggar v. Ossining Printing & Pub. Co., 161 A.D. 718, 146 N.Y.S. 529 (2d Dept. 1914), the single instance rule was applied to a charge that a dentist had done some work in an unskillful and negligent way.

In the instant case, the articles in question do not in any way impugn Mr. Bordoni's personal character or integrity. Accordingly, the single instance rule is fully applicable and requires affirmance of the judgment of the District Court.

CONCLUSION

For the foregoing reasons, the District Court was correct in finding that the news articles complained of are not libelous per se, and that the Complaint failed to state a claim on which

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relief could be granted. Accordingly, the District Court was correct in granting judgment on the pleadings for defendants-appellees, and that judgment should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARLO BORDONI,	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	No. 75-7513
	)	
THE WASHINGTON POST COMPANY, JACK EGAN and B.C. BRADLEE,	)	
	)	
Defendants-Appellees	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief for Defendants-Appellees has been mailed, postage prepaid, to David A. Field, Esq., 605 Third Avenue, New York, N.Y. 10016 this 4th day of December, 1975.

Richard M. Cooper

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